May 3, 2002

Comments by:
New Hampshire ISP Association
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on FCC Docket 02-33 Notice of Proposed Rulemaking - "Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities"

The FCC is seeking comments on the appropriate statutory classification and regulatory framework for wireline broadband Internet access services.

We will discuss problems with the FCC proposal to classify "Internet Access Services" as "information services"; and suggest improvements.

We will not comment on which services should be required to contribute **directly** to the Universal Service Fund: that is a point for lawyers to argue. We only suggest that many Internet Services already contribute indirectly, and should continue to do so.

We note that the NPRM uses an unfortunate definition of "facilities-based" providers: those which "furnish their own" last-mile connection. We suggest that this definition is not helpful, since there are public-policy reasons to limit the number of wires (and/or fibres) strung along poles on our public highways.

We laud the Commission for its goals of

- encouraging the ubiquitous availability of broadband to all Americans,
- promoting the development and deployment of multiple broadband platforms,
- fostering investment and innovation in a competitive broadband market, and
- developing an analytical framework for regulating broadband that is consistent, to the extent possible, across multiple platforms.

We note, however, that the last of these may limit the options available to satisfy the first three.

The Commission tentative[ly] concludes that, as a matter of statutory interpretation, the provision of wireline broadband internet access service is an information service reasoning that *providers of wireline broadband Internet access service offer more than a transparent transmission path to end- users and offer enhanced capabilities.*
We comment that while providers of Internet Service typically offer enhanced capabilities, these must rest on a telecommunications base which provides "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

In point of fact, most providers offer a service which combines basic IP routing with enhanced services.

To the extent a service is advertised as "Internet Access", we contend that the user should be entitled to view it as a "telecommunications service" which simply accepts, routes, and delivers IP packets.

If a provider offers a service limited to transmission of packets, we contend that such a service is "the offering of telecommunications for a fee directly to the public," which is exactly the definition of a telecommunications service.

If a provider offers separate services, one of which is limited to accepting, routing, and delivering IP packets, and another which combines this with enhanced capabilities (e-mail is the most obvious example), it seems obvious to us that the first is a telecommunications service while the second is an information service.

If a provider offers a service which combines this telecommunications service with other information services, it would seem at first blush that this service still meets the definition of a "telecommunications service".

The Commission tentatively concludes that when an entity provides wireline broadband Internet access service over its own transmission facilities, this service, too, is an information service under the Act.
Our discussion applies regardless of the ownership of the facilities involved. We do not see how the ownership changes anything.

In addition, the Commission tentatively concludes that the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is "telecommunications" and not a "telecommunications service" as defined in section 3 of the Act.
We agree that it is "telecommunications"; we understand the argument that it is not a "telecommunications service" (since it is not separately offered for a fee). We note, however, that the end-user may view and use the combined service as a "telecommunications service" if s/he is not offered a separate "telecommunications service".

The Commission tentatively concludes that providers of wireline broadband Internet access service offer more than a transparent transmission path to end-users and offer enhanced capabilities. Thus, it tentatively concludes that this service is properly classified as an "information service" under section 3 of the Act.
We agree entirely that this fits the definition of "information service", in that it is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications".

However, we have searched in vain for any indication that Congress intended that no service could fit both definitions.

The Commission seeks comment on these tentative conclusions and the supporting statutory analysis asks additional questions with regard to the proper classification of wireline broadband Internet access service, including asking parties to offer any factual evidence that would suggest a contrary application of the statute.
We find the Commission's haste to classify all broadband services as "information services" and declare them not to be "telecommunications services" unwise. It is clear from reading either the 1934 Act or the 1996 revisions that Congress believed the universal availability of telecommunication services to be a national priority. We contend that Congress simultaneously viewed "information services" as less of a priority, and chose to leave the provisioning of these to the free market.

We suggest that Congress has voted for a number of bills which declare broadband services as a priority, even if they have not yet finally clarified the extent to which these should depend upon the free market.

Further, we suggest that when a service does in fact offer transmission without change in the form or content, and is advertised as such, it will be viewed by customers as a telecommunications service, regardless of how the FCC views it.

The NPRM also analyzes whether wireline broadband Internet access service provided over the provider's own facilities is an information service, a telecommunications service, or both.
We see it as both.

The Commission believes that the end user is receiving an integrated package of transmission and information processing capabilities from the provider.
We suggest that the mere combination of services under a single fee does nothing to destroy the separate nature of those services.

It believes that the fact that the provider owns the transmission does nothing to change the nature of the service to the end-user.
We agree.

Accordingly, the Commission tentatively concludes that wireline broadband Internet access service provided over a provider's own facilities is an information service.
This does not follow. The ownership does nothing to destroy the separate nature of the services.

The provision of telecommunications rises to the level of a "telecommunications service" under the Act when it is offered "for a fee directly to the public."
Please note, Congress did not say "separately offered". If the service is offered bundled with another service, why is it not still "offered for a fee"? Does the inclusion of some number of "free" Directory Information calls within the monthly fee for telephone services transform the package such that it is no longer a "telecommunications service"?

It seems as if a provider offering the service over its own facilities does not offer "telecommunications" to anyone, it merely uses telecommunications to provide end-users with wireline broadband Internet access services,
We entirely disagree. The provider advertises "Internet Access" as a service which does not change form or content; and it delivers services which, in our opinion, entirely fit the definition of "telecommunications". The only room for disagreement is whether the bundling of those services with others prevents them from fitting the definition of "telecommunications services".

which, for the reasons discussed previously, the Commission believes is an information service.
We are not convinced that the end-users view it as only an information service.

Therefore, the Commission tentatively concludes that in the case where an entity combines transmission over its own facilities with its offering of wireline Internet access service, the classification of that input is telecommunications, and not a telecommunications service. It seeks comment on these tentative conclusions and the statutory analysis underlying them.
Were it to be the case that "telecommunications" was not available to the end-user, only "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications", this conclusion would be correct. However, we contend that "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received" is in fact available to the user directly.

The Commission also seeks comment on the prior conclusion... that an entity is providing a "telecommunications service" to the extent that such entity provides only broadband transmission on a stand-alone basis, without a broadband Internet access service.
We believe this conclusion overstated the case. In point of fact, many cable Internet services fall short of the

definition of "telecommunications". However, this is not because the advertised service bundles other services along with the IP routing and delivery services, but because the IP routing and delivery services, as available to the customer, never fully satisfied the definition of "telecommunications".

Thus, we dissent to the extent this conclusion suggested that the combination of two services destroyed the telecommunications nature of the first.

Commenters should address what the appropriate statutory classification of broadband transmission should be when it is not coupled with the Internet access component.
To the extent cable Internet service actually delivers IP routing and delivery that fully satisfies the definition of "telecommunications", we believe that portion of the service should be recognized as a "telecommunications service" if offered to the public for a fee, whether or not it is bundled with another service.

We point out that, unless this viewpoint is accepted, there is **nothing** within the cable package which could possibly be termed a "telecommunications service", because cable service is always offered bundled with "basic service". This **will** prove a serious mistake when (not if) cable companies start offering Voice over IP services.

Commenters should also address whether the provision of wholesale xDSL transmission should be considered "telecommunications" or "telecommunications service" under the Act. If xDSL is being offered on a wholesale basis as an input to ISPs' information services, is it being offered "directly to the public"?
We contend that the public **does** get direct access to telecommunications in such a setup, which is how we read the intent of Section 3(a)(51). But even if one were to disagree with that reading, the immediately following language, "or to such classes of users as to be effectively available directly to the public, regardless of the facilities used" makes such a setup clearly meet the definition of "telecommunications service".

In this regard, commenters should discuss how judicial and Commission definitions of common carriage might apply, and address whether ISPs -- as a class -- might be interpreted as the "public" under the statutory definition of "telecommunications service."
We believe Congress intended "the public" to mean any citizen, whether or not they are engaged in a particular occupation. Thus an offering to a minority of the citizens who are engaged in some occupation, in our opinion, does not count as offering to the public.

However, we point out that ISPs clearly are a class of users which make the telecommunications effectively available directly to the public, and fit the next phrase of 3(a)(51): "The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.'"

Furthermore, note that the definition of "telecommunications service" makes no reference to who offers it. Thus we find no justification for interpreting "directly" to refer to a particular business arrangement between the customer and some unnamed entity, rather than refer to the customer being offered "direct" access to telecommunications.

As an example, plain old telephone service is universally agreed to be a "telecommunications service," even when the customer pays a third party engaged as a sales agent.

Commenters should also discuss the circumstances under which owners of transmission facilities offer broadband transmission on a private carriage basis. Specifically, the Commission seeks comment on whether and how the Commission might regulate incumbent LEC provision of broadband to third-party ISPs as private carriage.

This clearly would not fit the definition of "telecommunications service". Thus we believe any regulation would have to fall elsewhere.

Further, to the extent that a carrier continued to offer xDSL transmission under tariff, would all xDSL transmission services offered by that carrier be deemed "telecommunications services," or could certain xDSL services be concurrently offered through individually negotiated contracts as private carriage?
We cannot believe anyone would seriously argue that the use of a technology such as xDSL (actually a **family** of technologies) would override the clear language of the Act.

Although the Commission tentatively concludes that wireline broadband Internet access service is an information service, it asks parties to comment on whether it should be classified as something other than an information service.
Since our disagreement is over *whether* a single classification is appropriate for the full range of services, we cannot suggest a "better" single classification.

For example, is there anything about the self-provision of this service that alters the function provided to the end user such that the service should be classified as a telecommunications service?
As we see it, the definitions deal with the service itself, not how it came into being.

Alternatively, should it be classified as two separate services, both an information service and a telecommunications service?
That is our recommendation -- to the extent the components satisfy those definitions.

Should it instead be classified as a new kind of hybrid communications service, neither an information service nor a telecommunications service?
This would be reasonable, but we question whether the Commission has authority to create new classifications, with the possible exception of combinations of existing classifications.

The Commission also notes that the 1996 Act uses and defines the term "advanced telecommunications capability" in section 706... It seeks comment on whether wireline broadband Internet access services should be classified as an "advanced telecommunications capability."
We believe these services clearly fit the intent of Congress, and deserve that classification.

It would seem, however, that you are still left with the problem of whether these services fit the definitions of "telecommunications service" and/or "information service".

It seeks comment on the relevance, if any, that section 706 has to the issues raised in this proceeding.
Section 706 requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" "by utilizing" "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

Note the "or".

You have an obligation to "encourage", but no specific guidance on how. We would comment that, in our view, the record of competition is far more encouraging than the record of all the other methods mentioned; and we would hope you will give this method the emphasis it deserves.

The Commission seeks comment on whether the Computer Inquiry requirements that are applicable to the transmission component of information services should be modified or eliminated, and whether such requirements are overly broad or under inclusive as applied to the nascent broadband market. Specifically, the NPRM contains specific questions addressing the necessity and usefulness of these requirements as applied to self-provisioned wireline broadband Internet access service, and seeks comment on whether it may be appropriate to impose alternative requirements to better address the technology and market characteristics of these services.
We advise treading carefully when declaring a court ruling "obsolete".

To the extent the Commission decides that none of the existing Computer II/III nondiscriminatory access obligations should apply to carriers providing wireline broadband Internet access services, it seeks comment on whether alternative access obligations should be applied.
We advise treading carefully when declaring a court ruling "obsolete".

The fundamental obligations stemming from Computer II/III still apply, because the laws on which they were based are still in force. There is some room for applying the definitions of the 1996 rewrite, but the fundamentals of providing access to providers of information services, including access to the information necessary to order UNEs, remains intact. Whatever "alternative access obligations" you choose must satisfy these fundamentals, or you will be back in court.

In addition, it seeks comment on how any proposed alternative regulatory or contractual access obligations might be priced in the context of a minimal regulatory Title I regime. For example, commenters should consider whether, under a new regulatory approach, self-provisioning wireline broadband providers should be required to do no more than make transmission available to competitors at market-based prices, or whether they should be required to make transmission available to competitors at commercially reasonable rates.
In the absence of a market (a sufficient number of suppliers), you would need to specify "commercially reasonable".

It also asks parties to comment on what the appropriate classification would be of any broadband transmission services required to be offered to independent ISPs.
We cannot imagine any "one-size-fits-all" classification. Ideally, private carriage would be available. The fact that we now depend heavily on "telecommunications services" under tariff does not mean this is the appropriate classification for anything we might use.

It also seeks comment on the applicability of sections 201 and 202 of the Act to any such stand-alone broadband offerings, and how those sections should inform any determination we may make about the pricing of broadband transmission provided to third parties.
Those sections were written with an emphasis on broadcast services; and it seems unlikely that Congress intended them to apply to wireline services.

The Commission asks parties to comment specifically on the incentives that the Commission would create were it to impose requirements other than the Computer II/III requirements on the provision of wireline broadband Internet access service. For example, were the Commission to modify or eliminate the requirements that the underlying transmission be made available to other ISPs on a nondiscriminatory basis, how would this affect the deployment of broadband?
As we read the history of telecommunications, it is **only** competition that has lead to innovation. Thus, to the extent that removing requirements that underlying transmission be made available to other ISPs resulted in the loss of competitive suppliers, we believe it would delay the deployment of broadband.

We think it important to remember that cable companies deploy on a ten-year or longer cycle, and that ILECs are used to 30-year depreciation cycles.

However, the equipment available for actual use in broadband is typically less than two years old. In our opinion, the turnover of broadband equipment will continue at this rate out as far as we can see. (None of us claim to be able to see more than five years into the future.)

The effective and economically affordable deployment of broadband **will** depend upon using the appropriate equipment. We believe that smaller firms are better positioned to quickly evaluate the equipment that becomes availabe; and are far better equipped to manage quick turnover of equipment.

How would competing ISPs that do not own transmission facilities obtain the inputs they need to provide competing broadband Internet access services?
We suggest a thought experiment.

Imagine that the wires and fibres that run along the roads were owned by a totally separate company that could only sell access to those wires and fibres.

Would such a company refuse to sell access to those wires to an ISP with cash in hand? We believe not.

As things now are, the ILECs that own those wires **do** refuse to sell access to them; and they hire lawyers to argue before state PUCs that they shouldn't be required to.

Perhaps you should ask the ILECs what their problem is. We believe a lot of it is bureaucratic inertia. Thus, we hope that the problem will disappear with time.

In any case, we believe that access by ISPs to those wires at commercially reasonable rates is clearly what Congress intended; and the faster we can get there, the faster broadband will be deployed.

Would the removal of all unbundling requirements motivate incumbent LECs, including BOCs, to only provide broadband transmission as part of integrated information services in order to restrict its availability, or would there be countervailing reasons why carriers would still choose to provide high-speed transmission to other entities on a stand-alone basis?
Elementary economics says that in a monopoly situation, profits are maximized at a price higher than the market price.

Bureaucratic Science (BS, for short) suggests that an organization which is used to monopoly status will find it easier to continue to operate as a monopoly.

In our experience, our ILEC has spent far more time and resources on lawyers to argue they don't-have-to than they have spent considering how to provide the access required under Computer II/III. Thus, we believe that ILECs will continue to prefer to supply broadband services to their own affiliates, whether or not there is a conscious intent to restrict the market.

Will these incentives be affected to the extent that these broadband Internet access services begin replacing traditional telecommunications services?
We see no reason to think so. The economic incentives go quite the other way.

Commenters arguing that removal of the requirements will lead to a significant reduction in the availability of high-speed transmission to non-facilities-based ISPs should address with specificity why this situation cannot be addressed through private, unregulated contractual arrangements or other marketplace solutions.

We fail to share the Pollyanna vision that sees marketplace solutions in the absence of markets. Unless we actually reach the point of having half a dozen different companies' wires running along the roads, we don't believe it will behave like a free market.

If you believe it would be a good thing to **have** half a dozen different companies running their wires to every home, we must suggest you come to New Hampshire and talk with our actual residents.

Alternatively, if the Commission were to continue to impose unbundling requirements only on incumbent LECs or BOCs, how would this affect their incentive to continue deploying new and innovative broadband information services?
In our opinion, positively. There is no mistaking the pattern: where their monopoly is firm, nothing new gets deployed, regardless of promises made. Where their monopoly is challenged, they act.

The Commission seeks comment on the extent to which other obligations might be affected by classifying wireline broadband Internet-access services as information services. It asks questions about the relevance of three basic public protection obligations of telecommunications service providers--(i) national security, (ii) network reliability, and (iii) consumer protection--to wireline broadband Internet-access services.
By its nature, the Internet was designed to survive damage. It is widely reported that despite all the bombing of Iraq, their communications system survived, specifically because they used Internet principles.

However, the "Internet" is designed to be a "network of networks". If instead we allow it to become a network under the management of only one or two companies, these design advantages will probably disappear.

The principle is simple: redundancy is the secret of dependability, and redundancy comes for free in an internet of *many* networks.

Thus both national security and network reliability are better served by diversity of ownership. Consumer protection, in our opinion, is also best served by a multiplicity of choices. When options are few, state regulators must tread carefully in enforcing consumer protection laws.

Commenters should discuss what role, if any, the Commission or its designees should have in ensuring the network reliability and interoperability of wireline broadband Internet access services.
We believe that Congress has always envisioned the FCC as the agency to make rules which facilitate network reliability. We argue that the simplest way to do so is by ensuring a large number of potential suppliers.

It is less clear what Congress intended in the way of ensuring interoperability. Regardless, most issues of interoperability will have to be worked out between the suppliers. We suggest that attempts to impose standards prematurely are ill-advised; and we comment that, in our experience, interoperability is a far easier problem when no individual provider has majority control.

For telecommunications service providers, the Commission has found that network reliability is of paramount importance in any number of settings and, in particular, has directed the Network Reliability and Interoperability Council (NRIC) to explore and recommend measures that would enhance network reliability

and interconnectivity. Commenters should address the costs and benefits of authorizing NRIC to make technical interconnectivity and interoperability recommendations with respect to wireline broadband Internet access service.
We are not specifically familiar with this organization. (Which is a bad sign.)

A brief perusal of their web page (www.nric.org) shows a scarcity of non-US members. (Which is a very bad sign.)

A perusal of the publications of the fifth council gives no obvious evidence of consideration of the problems of spam and distributed-denial-of-service. (Which means they're not looking at the right problems.)

Alas, we are pessimistic about the benefits of this approach.

Finally, the Commission seeks comment on the implications of its tentative conclusions for incumbent LECs' obligations to provide access to network elements under sections 251 and 252 of the Act. Because "network element" is defined under the Act as a "facility or equipment used in the provision of a telecommunications service," how could an incumbent LEC provider of wireline broadband Internet access service over its own facilities be required to provide access to those facilities as "network elements" if those facilities are used by the incumbent LEC exclusively to provide information services?
This gets dicey. To the extent the FCC disclaims the existence of a "telecommunications service", it seems rather difficult to require access to a "network element".

However, we very much doubt that the court would find this circular reasoning convincing as an excuse to abandon Computer II/III.

For example, what would be the implications for the Commission's line sharing and line splitting rules?
If the Commission recognizes the existence of multiple services, even when bundled and sold together, there would be no problem.

If an incumbent LEC provider of wireline broadband Internet access service over its own facilities uses certain facilities to provide both information services and telecommunications services, to what extent would the LEC be required to provide access to such shared-use facilities as "network elements?"
Clearly, to the extent they are "used in the provision of a telecommunications service".

The Commission seeks comment on whether the Commission could compel the unbundling of network elements used in the provision of information services, pursuant to Title I or some other statutory authority. Does the Commission's Title I authority allow it to limit such obligations to certain types of providers, such as incumbent LECs, or would the Commission be required to adopt rules of general applicability under Title I?
In our opinion the Computer II/III court would require more general availability.

In addition, because section 251(c)(3) allows a requesting carrier to request access to network elements "for the provision of a telecommunications service," would a provider be prohibited from using network elements pursuant to section 251 to provide wireline broadband Internet access service?
The FCC can hardly require access to network elements for provision of a service of which it denies the existence. However, we do not believe that this language was ever intended to exclude uses in addition to the "provision of a telecommunications service". We remind you that such network elements regulary transmit signalling information which clearly does not fit the definition of "telecommunications".

We emphasize that 251(c)(3) contains no language to limit the business relationship between the "requesting carrier" and the "public"; and we sincerely hope the FCC will not start down a path which requires any particular business arrangement.

The Commission seeks comment generally on the role of the states with respect to wireline broadband Internet access services if the Commission were to find it to be appropriately classified as an information service under Title I of the Act.
More confusion.

The Commission has previously found that when xDSL transmission is used to provide Internet access services, these services are interstate and, thus, subject to Commission jurisdiction.
Which is not the same thing as denying the existence of services...

It thus seeks comment on whether, and if so how, classification of wireline broadband Internet access service as an information service would affect the balance of responsibilities between the Commission and the states. It asks parties to comment on what they consider an appropriate role for the states in this area, taking into account both policy considerations and legal constraints, including any applicable limitations on delegations of authority to the states under Title I of the Act.
States already tread **very** carefully here. It's hard to say how much worse this would make it. However, we would like to point out that jurisdictions frequently overlap; and the claim of FCC jurisdiction for the interstate service does not prevent state jurisdiction over matters of public safety.

The appropriate role for the state, in our opinion, is full jurisdiction over any entirely intrastate telecommunication, regardless of its use in providing Internet Access.

We understand that, for historic reasons, it has typically been hard to determine whether a particular telecommunications service **is** entirely intrastate; and the typical arrangement for Internet Access through the national providers crossed state boundaries much more often than people realized.

We do not believe that delegation of jurisdiction for entirely intrastate services exceeds FCC authority, but we recongize that reasonable men may disagree.

Additionally, parties should comment on whether current state regulations, if any, should be preempted to any extent if the Commission were to find that wireline broadband Internet access service is appropriately classified under Title I of the Act. Parties should be specific in identifying such state regulations and in explaining how such regulations would interfere with the Commission's oversight under Title I.
We are not aware of any specific regulations as described.

The NPRM seeks comment on whether providers of broadband Internet access services provided over wireline and other platforms, including cable, wireless and satellite, should be required to contribute to universal service.
We remind you that those of our members who do not contribute directy still contribute indirectly. This may be an administratively preferable way to handle the issue.

In closing, we comment that the appropriate framework for broadband access is that broadband access should have an equal footing with plain old telephone service in how its role is perceived and in the importance that it is given. There should be no assumption that a line used for broadband somehow serves the public less than a line that is used for dialtone.

If it's OK to order the ILEC to install a line for dialtone, it should be OK to order them to install a line for broadband. We see no way that broadband Internet access can become ubiquitous until that principle is accepted.

We fear that any classification of broadband service that fails to allow for equity with dialtone will be a step in the wrong direction.

Submitted by

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